

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

ROOKIE SKATEBOARDS LLC, a New York Limited Liability Company,	)	NO. 62244-7-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
A.V.G. TRANSPORTATION SPECIALISTS, INC., a Washington corporation,	)	Unpublished Opinion
	)	
Respondent.	)	FILED: June 29, 2009
	)	

Lau, J. — This case involves a contract dispute between Rookie Skateboards and A.V.G. Transportation Specialists over two lost crates containing Rookie’s trade show goods. Relying on the contract’s liquidated damages provision, AVG offered to pay Rookie \$1,394. But Rookie refused and filed suit to recover its actual damages. After a bench trial, the court awarded Rookie \$1,394 in liquidated damages, but offset this award with a \$51,500 award of attorney fees and costs to AVG as the prevailing party. Because the trial court properly found that AVG was the prevailing party, we

affirm.

FACTS<sup>1</sup>

The facts are undisputed. Rookie Skateboards sells skateboards and related merchandise. In the past, it exhibited its merchandise at trade shows on the West Coast. A.V.G. Transportation Specialists, Inc., specializes in shipping trade show vendors' goods from one trade show to another. On September 8, 2002, Rookie retained AVG to ship two crates from San Diego, California to a storage facility in Los Angeles, California. The crates contained Rookie's trade show goods and weighed about 2,788 pounds. Rookie planned to store the crates until its next trade show.

Rookie and AVG entered into a shipping contract titled Airbill Number 23879 (the "airbill contract"). Section 9 of the airbill contract contained a liquidated damages provision:

[AVG's] liability for damages or loss to the shipment of Property shall not exceed \$0.50 per pound of the Property as set forth on the Airbill, unless a Declared Value amount has been stated on the Airbill and [Rookie] pays the applicable excess value charge, in which case [AVG's] liability shall not exceed the Declared Value.

Rookie elected not to pay to insure the goods for a declared value.

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<sup>1</sup> Although Rookie's opening brief asserts that the trial court's conclusions are not supported by substantial evidence, Rookie points to nothing in the record that contradicts the court's factual findings. Because Rookie has not satisfied its burden of showing that the court's findings are unsupported by substantial evidence, they are verities on appeal. Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 940–41, 845 P.2d 1331 (1993). In any event, Rookie's reply brief clarifies that its appeal is based on its view of the law, not the facts: "The evidence in the record is not disputed. . . . The crux of this appeal is that the trial court's post-trial rulings are contradictory and are not supported by applicable law relating to prevailing party and awards of attorney fees and costs." Appellant's Reply Br. at 1–2.

Rookie eventually suspended its trade show plan and decided instead to store the two crates for several years. Consequently, on June 24, 2005, Rookie and AVG entered into a "Revised Storage Rate Schedule" contract. This storage contract contained the following provision: "I HAVE READ AND UNDERSTAND THE TERMS AND CONDITIONS OF THIS AGREEMENT AS SET FORTH ABOVE AND AGREE TO CONDITIONS ON THE AVG BILL OF LADING AND CONTRACT [the Airbill contract]."

Sometime in July 2005, Rookie discovered the crates were missing. AVG failed to locate the crates. It offered to pay Rookie \$1,394 pursuant to the airbill contract's liquidated damages provision. But Rookie rejected this offer, asserting it was entitled to recover its actual damages, which exceeded \$17,000.

On August 30, 2006, Rookie sued AVG, alleging claims for conversion, negligent loss by bailee, negligence based on *res ipsa loquitur*, and unjust enrichment. In addition, Rookie sought to recover its actual damages on a breach of contract theory. AVG argued that Rookie's remedies were limited by the Airbill's liquidated damages clause to \$1,394. Rookie disagreed, arguing that the liquidated damages provision in the Airbill contract was not integrated into its storage contract with AVG. On October 10, 2006, AVG made a CR 68 offer of judgment in the amount of \$1,750, inclusive of costs. Rookie refused the offer. And on February 19, 2008, the case proceeded to a bench trial.

After trial, the court found: (1) AVG breached the storage contract by losing Rookie's goods, (2) the Airbill contract's liquidated damages clause was integrated into the storage contract, (3) Rookie was only entitled to \$0.50 per pound, for a total of \$1,394, (4) AVG met its contractual

obligations under the liquidated damages provision by offering Rookie \$1,394, and (5) Rookie's breach of contract claim was without merit. The court also dismissed Rookie's conversion, negligence, and unjust enrichment claims.

Thus, the court awarded Rookie judgment of \$1,394, but offset this with an award of attorney fees and costs to AVG of \$51,500. The court reasoned that the Airbill contract entitled the "prevailing party" to recover "all reasonable attorney fees, costs, and expenses." Finally, it found that AVG was the prevailing party and therefore entitled to an award of reasonable attorney fees, costs, and expenses. Rookie appeals.

### ANALYSIS

#### Breach of Contract Claim

Rookie argues that the trial court erred in dismissing its breach of contract claim because the court also stated that AVG breached the storage contract by losing Rookie's goods. According to Rookie, the trial court "contradicted itself" by concluding there was a breach while at the same time dismissing Rookie's breach of contract claim.

But there is no contradiction. The trial court's findings of fact and conclusions of law make clear that AVG breached the contract because it lost Rookie's crates. And AVG satisfied its contractual obligation under the liquidated damages provision when it offered to pay Rookie \$1,394. Rookie does not argue or cite any authority in its briefing to show that the liquidated damages clause was an unenforceable penalty or that the trial court's reliance on it was erroneous. Because the liquidated damages provision governs, the trial court properly

ruled that Rookie's breach of contract claim for actual damages was without merit.

### Prevailing Party

Rookie next contends that the trial court erred in awarding AVG attorney fees and costs because it and not AVG was the prevailing party. Under the Airbill contract, the prevailing party in any dispute is entitled to recover attorney fees and costs. RCW 4.84.330 recognizes the validity of such agreements and defines the prevailing party as the party "in whose favor final judgment is rendered." Rookie argues that it was the prevailing party because it obtained an affirmative judgment of \$1,394. In contrast, AVG contends that it prevailed because Rookie's claims were all dismissed and Rookie was awarded only the amount that AVG had already offered before the lawsuit began. While the determination of which party prevailed has been described as a mixed question of law and fact, this court reviews the trial court's determination under the error of law standard. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). Alleged errors of law are reviewed de novo. Trotzer v. Vig, 149 Wn. App. 594, 612, 203 P.3d 1056 (2009).

The prevailing party is generally the party who receives an affirmative judgment in his or her favor at the conclusion of the case. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). However, "[i]f neither party wholly prevails, then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties." Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217, 130 P.3d 892 (2006). When both parties

prevail on a major issue, there may be no prevailing party for attorney fee purposes.

Phillips Bldg. Co. v. An, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996). Further, the trial court may use a “proportionality approach” based on the relative success of the parties when there are distinct and severable claims at issue. Marassi v. Lau, 71 Wn. App. 912, 917, 859 P.2d 605 (1993). A defendant who successfully defends against a claim may be the prevailing party. See Crest, Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 772, 115 P.3d 349 (2005) (trial court did not err in finding defendant to be prevailing party when it successfully defended the major claim of the case even though the trial court granted a judgment to the plaintiff based on other claims).

Rookie’s reasoning that it prevailed because it obtained an affirmative judgment is not persuasive. In this case, the trial court dismissed all of Rookie’s noncontract claims. And on the remaining breach of contract claim, the trial court rejected Rookie’s claim for actual damages for breach of contract. Instead, it adopted AVG’s position that the liquidated damages provision controlled. Thus, the \$1,394 judgment that Rookie relies on to establish it was the prevailing party actually represented a loss for Rookie. Moreover, AVG offered to pay Rookie this sum before the litigation began, so Rookie gained nothing by filing the lawsuit.

This case is similar to Richter v. Trimberger, 50 Wn. App. 780, 750 P.2d 1279 (1988). There, the dispositive issue was whether the trial court erred in awarding attorney fees to the defendant while at the same time entering a final judgment for the plaintiff. Richter, 50 Wn. App. at 783. Richter worked on Trimberger’s boat in order to obtain an ownership interest in the vessel. Trimberger signed a promissory note authorizing payment of \$15,000 to Richter

for the work. Trimberger then signed another note authorizing a \$50,000 payment to Richter with the understanding that Richter would have the option, after performing more work on the boat, to convert the \$15,000 into an ownership interest or take \$50,000 in cash. After the two had a falling out, they agreed that the value of Richter's work to that point was \$12,000. Trimberger sent Richter a \$12,000 check, but Richter refused it. Richter later sued on the \$50,000 note, which entitled the prevailing party to attorney fees and costs. The trial court denied Richter's claim for \$50,000, but ruled that he was entitled to \$12,000 for work performed. Richter, 50 Wn. App. at 781–82.

On appeal, this court stated,

[Richter] was only entitled to the \$12,000 that he and [Trimberger] had agreed upon as compensation for construction work he had completed on the vessel. Since [Trimberger] tendered the \$12,000 to [Richter], [Richter] was never denied the use of that money. [Richter] did not achieve anything at trial that had not been offered to him prior to trial; therefore, he was not the prevailing party. Accordingly, the trial court did not err in denying [Richter] attorney's fees.

Richter, 50 Wn. App. at 784.

To impose the Richter result here would not be unjust because Rookie did not achieve anything at trial that it had not been offered before it filed suit. And AVG's CR 68 offer of judgment was made well before Rookie incurred litigation fees and costs.

Rookie also argues that it was the prevailing party because it improved its position over the CR 68 offer of judgment for \$1,750, including costs. Rookie contends that it was entitled to \$450 in statutory costs and reasons that if those costs were added to the \$1,394 judgment, it would exceed the \$1,750 offer of judgment by \$94.

Therefore, according to Rookie, it was the prevailing party. But even assuming Rookie is correct in arguing that it is entitled to statutory costs, its prevailing party argument fails.

Under CR 68, a defendant may offer "to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued."<sup>2</sup> If the final judgment is less favorable than the offer, the plaintiff must reimburse the defendant for costs incurred after the offer was made and rejected. On the other hand, if the plaintiff obtains a final judgment that is more favorable than the defendant's offer, then the plaintiff does not have to reimburse the defendant's costs. But CR 68 does not speak to the determination of prevailing party for the purpose of awarding attorney fees because CR 68 is a cost-shifting device, not a fee-shifting device. Attorney fees are not included in the "costs" that can be shifted under CR 68 unless the governing statute or contract specifically defines attorney fees as costs.

See Eagle Point, 102 Wn. App. at 708.

In this case, no applicable statute defines attorney fees as costs. And the contract does not define attorney fees as costs. Indeed, CR 68 has no application if the plaintiff obtains a more favorable final judgment. See 4 Karl B. Tegland, Washington Practice: Rules Practice at 636 (5th ed. 2006) ("If the plaintiff wins a

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<sup>2</sup> CR 68 states in relevant part, "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."



judgment greater than the amount in the offer of judgment, CR 68 is out of the picture and the refusal to accept has no effect.”).

Rookie cannot use CR 68 to obtain prevailing party status under these circumstances. The trial court did not err in determining that AVG was the prevailing party. Accordingly, AVG is entitled to its fees and costs under RCW 4.84.330 and its contract with Rookie.

Attorney Fees On Appeal

AVG requests its attorney fees on appeal under RAP 18.1. A contractual attorney fee provision provides authority for granting fees on appeal. Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn. App. 64, 71, 975 P.2d 532 (1999). AVG has prevailed on appeal, so it is entitled to its reasonable attorney fees.

Affirmed.

WE CONCUR:

Leach, J.

Becker, J.